88-1941

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MOHAMMAD SHARIFINASSAB, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court was without jurisdiction to proceed against petitioner because the Immigration Reform and Control Act of 1986, 8 U.S.C. 1255a, provided him with amnesty?

2. Whether the trial court erred in failing to grant petitioner's motions for severance?

3. Whether the testimony of police officers regarding the alleged statement petitioner made by nodding his head should have been suppressed because the evidence was obtained in violation of petitioner's rights under the Fifth and Sixth Amendments of the U. S. Constitution?

4. Whether the superseding indictment failed to state an offense?

On Appeal to the United States Court of Appeals for the Sixth Circuit Petitioner raised six issues. After consideration two of those issues are being consolidated into other questions raised by this Petition.

PARTIES

The caption contains the names of all of the parties. It is anticipated that a Petition for a Writ of Certiorari may be filed by co-defendant, Bruce Zalman.

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REFERENCE TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit entered February 23, 1989 is attached in the Appendix page A-1. On April 3, 1989 the Court of Appeals for the Sixth Circuit entered an Order denying the Petition for Rehearing.

JURISDICTION

(i) The date of the Judgment sought to be reviewed is February 23, 1989; the time of its entry was not recorded by the Court of Appeals for the Sixth Circuit.

(ii) Petitioner's motion for rehearing was denied by the Court of Appeals for the Sixth Circuit on April 3, 1989.

(iii) Petitioner has no knowledge of any cross-petition for Writ of Certiorari being filed.

(iv) 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States. Relevant language of said Amendment reads as follows: "No person...shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

This case also involves the Sixth Amendment to the Constitution of the United States. Relevant language of said amendment reads as follows: "In a criminal prosecution the accused shall...be confronted with the witnesses against him... and to have the assistance of counsel for his defense."

This case also involves 8 U.S.C. 1255a. Relevant language of said statute reads as follows: "The Attorney General shall adjust the status of an alien to that of an alien

lawfully admitted for temporary residence if the alien meets the following requirements: (1) Timely application...(2) Continuous unlawful residence since 1982...(4) Admissible as an immigrant...(B)[he] has not been convicted of any felony or three or more misdemeanors committed in the United States..."

This case also involves 18 U.S.C. 1001. Relevant language of said statute reads as follows: "Whoever...knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations...shall be fined...or imprisoned...or both."

STATEMENT OF THE CASE

This is a criminal action commenced in the United States District Court for the Western District of Kentucky upon a superseding indictment charging Petitioner with conspiracy under 18 U.S.C. 371 and with falsifying a material fact to the Immigration and Naturalization Service under 18 U.S.C. 2 and 18 U.S.C. 1001. Petitioner is an alien who gained permanent resident status by virtue of his marriage to a citizen of the United States. Petitioner was tried with attorney, Bruce Zalman, who was also convicted for his alleged involvement in these and other charges related to various other conspiracies.

Petitioner, an Iranian, entered this country as a student at age 19 with very little knowledge of English. He has since earned his Master's Degree in Engineering.

He met his future wife in the reception room of the law office of attorney, Bruce Zalman while both were waiting to see Mr. Zalman on separate matters. After a courtship of approximately six months petitioner married on October 1, 1981 and subsequently applied for and was granted permanent residency. Approximately one year later petitioner's wife filed for a legal separation and in June of 1983 a decree of dissolution the divorce was entered.

Attorney Zalman had been previously indicted by the Commonwealth of Kentucky on charges related to his alleged connection with prostitution at certain massage parlors. After a highly publicized trial, he was acquitted. Investigation of Zalman's connection with the massage parlors developed evidence that he had arranged marriages between women, some of whom had worked at the

massage parlors, and certain Iranians who subsequently had attained permanent resident status. Petitioner's wife had coincidentally worked at one of the massage parlors. She died from a drug overdose prior to trial.

Petitioner denied that he had conspired to or had entered into a fraudulent marriage for the purpose of obtaining permanent residency. He testified that he had entered into a bona fide marriage for love and to raise a family. Petitioner's evidence corroborated this testimony.

The testimony against Zalman came primarily from Iranians and the women that they had married following agreements being reached with the United States with regard to the prosecution or lack of prosecution of these witnesses.

On Appeal the petitioner raised the same issues for which he now seeks review by this Court.

1. On appeal petitioner argued that although the Immigration Reform and Control Act of 1986, 8 U.S.C. 1255a, does not use the term amnesty, it does require the Attorney General to adjust the status of a qualified alien who applies to that of a person admitted for lawful residence. Petitioner was so qualified when he made his application. The effect of the Act was to grant amnesty to all qualified aliens who made application. The indictment was predicated on the assumption that the Petitioner was illegally present in the United States because he entered into a sham marriage. The offenses of which petitioner was charged all related to his obtaining the status of a permanent resident. The Act

required the Attorney General to adjust the status of aliens who by their illegal acts became illegal aliens. The Act was universally recognized as extending an offer of amnesty; and, therefore, petitioner should not have been prosecuted for alleged offenses that created his status as an illegal alien.

2. On appeal petitioner argued that the trial court erred in failing to grant petitioner's motions for severance. Petitioner was substantially prejudiced by the spill over effect of the evidence offered against Zalman regarding other allegedly arranged marriages of Iranian men with American women. Two of the other marriages, Mohammadzadeh/Goren and Kazemi/McAllister, were arranged by Zalman. The jury also heard evidence of a marriage between government witness Mahmoudsadeh and an American, as well

as evidence of another marriage between government witness Johangir Yaghmian to an American. The witness Mahmondsadeh was separated from his wife and the witness Yaghmian had divorced his, plead guilty to giving a false statement to INS, and entered a plea agreement to testify in this case. Jamshid Yaghmian, Johangir's brother, another government witness, also obtained permanent resident status based on his marrige to an American woman, which subsequently resulted in divorce. The jury heard evidence from government witnesses about six different marriages of Iranians to American women, all of which had resulted in divorce or separation, following the Iranian men obtaining permanent residency status based on the marriages. Additionally, two witnesses called by the Petitioner had coincidentally married American women, obtained permanent

resident status based on the marriages, and then subsequently became divorced. The confusion was undoubtedly further obfuscated in the minds of the jurors by the fact that Petitioner's first name, "Mohammad," sounds similar to the last names of two of the government's witnesses.

Because the trial court refused to grant severance, it refused to permit development of voir dire of the jury's knowledge and of the prejudice that resulted therefrom, if any, concerning Zalman's previous state court criminal trial; the trial court did not ask the voir dire questions regarding this tendered by petitioner. The trial court's refusal to permit petitioner from delving into the state court action in any way, denied petitioner his right to fully cross-examine government witnesses and denied petitioner the opportunity to put evidence

before the jury that certain statements were made within the context of that investigation; thus the jury was not told the whole truth. The trial court's interest in insuring that Zalman have a fair trial resulted in a denial of petitioner's right to full confrontation of witnesses against him. Zalman, furthermore, was charged with offenses totally unconnected with petitioner. Petitioner was not involved in or even connected with Counts 1 and 3 of the Superseding Indictment. There was no proof of an ongoing conspiracy. At the most there was only proof that Zalman was allegedly involved in separate similar offenses with different unrelated people. The joinder of defendants and offenses totally unconnected is prohibited by Rule 8(b) of the Federal Rules of Criminal Procedure; this is not a matter of discretion.

The spill over effect of the evidence on the jury was brought into even clearer focus by errors in the recitation of facts reflected in the Opinion of the Court of Appeals. The Court of Appeals, which had months to review the written transcripts, as well as the pleadings and the briefs of counsel, misapprehended facts regarding petitioner and confused testimony concerning him and his marriage with testimony and evidence that was actually about other Iranians. Thirty-nine people testified; some of them testified twice; seven of the government witness had Iranian last names; two Iranians were brothers and two others had very similar Iranian last names; petitioner took the stand and three of his witnesses had Iranian last names. The jury had to rely on its collective memory (in a trial lasting almost two weeks that was interrupted in the

middle by a one month continuance) to attempt to sort out the facts regarding several similar sounding fact situations involving various Iranians with difficult to pronounce names. At trial and on appeal petitioner attempted to demonstrate that although he was an Iranian student who desired to stay in the United States, that although he did marry a woman whom he initially met in Zalman's office, and that although he applied for permanent residency based on that marriage, there were many distinctions between his situation and the situations of the other Iranians who testified in exchange for various agreements offered by the prosecution. The Opinion of the Court of Appeals, however, reflected inaccuracies of fact and stated as fact inferences and conclusions about petitioner that were drawn from evidence concerning other Iranians

involved with Zalman who entered into fraudulent marriages to gain permanent residency in this country. The Opinion clearly demonstrated how a jury, which did not have the benefit of the time to study the written transcript, became unable to follow the trial court's instructions to consider each case separately and decide the case for each defendant solely on the evidence which applied to each defendant. The spill over effect of the evidence introduced by the United States against Zalman concerning the fraudulent marriages of other Iranians highly prejudiced petitioner. The government relied on the impact of its case against Zalman to carry the jury to a conviction of petitioner. Petitioner raised this error to the Sixth Circuit in his Petition for Rehearing, (See Appexdix page A-22) but the Petition was summarily denied. The instructions given to

the jury could not and did not adequately protect petitioner from the prejudicial effect of the evidence against Zalman not connected with petitioner, which the jury could not compartmentalize.

The trial court erred in failing to give instructions tendered by petitioner. Petitioner attempted to offset the prejudicial effect of the trial court's failure to grant petitioner's motions for severance through the rejected tendered instructions. Although much of petitioner's defense rested upon his personal conviction that he had entered into a bona fide marriage for life, tendered instructions supporting this defense and drawn from case law were not given, as were not given other instructions regarding the viability of the marriage and presumptions of its validity, even though these instructions were also supported by

case law. The rejected tendered instructions concerning the marriage went to the heart of petitioner's defense that he had in his own mind entered into a bona fide marriage for life, which was one of the distinguishing factors between petitioner's marriage and the marriages of the other Iranians. The trial court's failure to grant severance coupled with its failure to appraise the jury of law which supported petitioner's theory of the case and distinguished his marriage from those marriages of the other Iranians, who in fact did conspire with Zalman to gain illegal permanent residency status, resulted in a denial of a fair trial to petitioner.

The government's case against petitioner was predicated on the voluminous evidence that was presented against Zalman on totally unrelated conspiracy and marriage fraud charges. Reasonable minds not subjected to

the prejudicial effect of the government's case against Zalman on the other counts of the indictment would have had reasonable doubt as to the guilt of petitioner. The government offered absolutely no evidence of a conspiracy between petitioner and Zalman to come to a mutual understanding to try to accomplish a common and unlawful plan; nor was petitioner linked in anyway to other co-conspirators of Zalman. The evidence of the petitioner, that the marriage was not a sham, could not overcome the prejudicial effect of evidence of other marriages by Iranians to American women.

3. On appeal petitioner argued that testimony of police officers, that during questioning, petitioner had allegedly affirmatively nodded his head in response to certain incriminating questions, should have been suppressed on the following grounds:

(1) the police officers failed to give any warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); (2) the interpretation of the meaning of petitioner's nodding is a speculative conclusion of the witnesses who could not know what meaning petitioner intended by nodding; and (3) any statement made by petitioner was made following coercion and threats actual or implied by the police officers. The questioning occurred at petitioner's apartment during the course of the investigation of Zalman by the state authorities for his alleged involvement with the massage parlors and prostitution. The initial line of questioning as to the whereabouts of petitioner's wife, took an abrupt turn as the police began interrogating petitioner as to whether or not he had gotten married to stay in the United States. The

police failed to give any of the required Miranda warnings; petitioner understood and believed that he was the subject of a custodial interrogation.

4. On appeal petitioner argued that the superseding indictment failed to state an offense because (1) the purpose of his marriage to an American citizen was not a material fact to his application for permanent residency status; and (2) it is not unlawful to marry an American citizen for the sole purpose of obtaining permanent residency in the United States. The marriage was presumed to be valid. Since the material fact that petitioner was accused of covering up, namely the purpose of his marriage, is not material at all to a determination of the validity of the marriage, the indictment failed to state an offense.

REASONS FOR GRANTING WRIT

The issue raised by question number 1 is a question of first impression. Inherent in our system of law and government is embodied the concept that all men are created equal, that the law should be applied the same to everyone, and that each person should be given equal protection of that law. It was a denial of equal protection of the law to have proceeded with the prosecution of petitioner which resulted in a felony conviction and rendered him ineligible to have his status adjusted under the Act, when the United States is not proceeding against hundreds, if not thousands, of other aliens who were in this country by reason of their actions taken in violation of the immigration laws, but who were in effect extended amnesty and given an opportunity to apply to have their status adjusted without fear of prosecution. If

petitioner's marriage was a sham, entered into for the sole purpose of obtaining permanent residency, and his resident status thereafter was that of an illegal alien, then the Act required that his status should have been adjusted without the consequence of prosecution, thus providing him with amnesty. To the contrary petitioner has been singled out for prosecution and denied the protection of the Act. Petitioner's only recourse to have this wrong righted is for this Court to grant certiorari and ultimately reverse the Judgments entered herein.

Although the Act does not use the term "amnesty," this Court should be able to take judicial notice of the fact that public and the news media do have the perception that the Act does provide amnesty to illegal aliens who applied to have their status adjusted. Petitioner should have been

extended the same protection from prosecution extended to those illegal aliens who made the same application.

Next, certiorari should be granted to review the issues raised by the failure of the trial court to grant petitioner's motions for severance. Petitioner recognizes that while the overwhelming majority of reported cases that have considered this issue have resolved it in favor of not granting the motion, in the instant case the spill over effect of the evidence against petitioner's co-defendant was so prejudicial that even the Court of Appeals for the Sixth Circuit confused evidence which was introduced against Zalman alone with the evidence that was introduced concerning petitioner. The failure of the trial court to grant petitioner's motion for severance prejudiced petitioner from voir dire, through the trial

proceedings and into the instructions. Petitioner was denied the right to present all the facts to the jury. In violation of his rights under the Sixth Amendment petitioner was denied the right to fully confront the witnesses who testified against him. Except for the spill over effect of the government's case against attorney Zalman, it is inconceivable that the jury could have been convinced beyond a reasonable doubt that petitioner was guilty. As this Court stated in Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) at page 61 L.Ed.2d 567:

> "The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt."

Then at 61 L.Ed.2d 572:

> "A 'reasonable doubt' at a minimum is one based upon 'reason.' Yet a properly instructed jury may

> occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury."

Petitioner would not have been convicted without the impact of the case against Zalman.

Furthermore, certiorari should be granted because testimony from the police as to a statement in the form of the petitioner affirmatively nodding his head in response to questions posed was introduced when the police had failed to give petitioner any warnings required by Miranda v. Arizona, supra. The trial court initially denied petitioner's motion to suppress, but then vacated its order and directed that the issue be briefed. In its Memorandum Opinion once again overruling the motion to suppress the trial court stated:

> "While we believe that our original opinion was correct, we are inclined to the view that this motion may present a close question of law, and that if the Court of Appeals believed this Court wrongfully decided it, it would be grounds for reversal."

The Court of Appeals considered, but did not discuss this issue determining the remaining assignments of error including this one to be without merit. (Opinion page 19).

The Fifth Amendment provides that a person is not required to testify against himself. The Sixth Amendment provides for the right to counsel. The denial to the petitioner of the protection of these amendments was a denial of due process of law. In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 314 (1984) this Court rejected the argument that Miranda rights do not attach until a person is

formerly placed under arrest. The Court stated at 82 L.Ed2d 336 that:

> "A policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."

During the questioning by the police petitioner felt completely at the mercy of the police. The error of permitting this testimony, which parenthetically was speculative and conclusionary in nature (petitioner, whose native tongue is not English, testified that if he nodded his head in the affirmative, it was a gesture meaning he understood what was being said), should be corrected by granting this Petition for the Writ and ultimately reversing the Judgments entered herein below.

Finally, certiorari should be granted because the superseding indictment failed to state an offense in that (1) the purpose of petitioner's marriage to an American citizen was not a material fact to his application for permanent residency status based upon that marriage; and (2) it is not unlawful for an alien to marry an American citizen for the sole purpose of obtaining permanent residency in the United States. Count 2 charged a conspiracy to "falsify, conceal, or cover up by trick, scheme, or device a material fact that is the actual purpose for the marriages arranged by the defendants..." Count 4 charged a substantive offense alleging the same element. The allegation was that the marriage in question was entered into for the purpose of obtaining resident status for petitioner and that since he concealed this fact, an offense was

committed. Courts that have examined this issue have established that the motive of two individuals in marrying is irrelevant, if the marriage is bona fide. See United States v. Dorto, 5 F.2d 596 (1st Cir. 1925). In Cirulli v. Licuta, N.J., 77 A.2d 288 (1950) the state appellate court found at page 290 that,

> "The act of an alien in entering into a bona fide marriage 'to avoid deportation' is not illegal."

Since the "material fact" that the petitioner was accused of covering up, namely, the purpose of the marriage in question, is not material at all to the determination of the validity of the marriage, the indictment failed to state an offense. The denial of tendered instructions concerning law with regard to the petitioner's defense resting upon his personal conviction that he had entered into a bona fide marriage for life

compounded the error of the trial court's failure to sustain petitioner's motion to dismiss on the grounds that the indictment failed to state an offense. Again, this Petition for certiorari must be granted to rectify this error.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated 26th May, 1989

PROOF OF SERVICE

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Alan W. Roles, being first duly sworn, deposes and says that he is admitted to practice before the Supreme Court of the United States; that on the 26th day of May, 1989, the Petition for Writ of Certiorari in the above entitled case was deposited in a United States post office mail box located in Louisville, Kentucky with First Class postage prepaid properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said Petition for Writ of Certiorari, and with an additional copy of the Petition and Affidavit of mailing on counsel for respondent: Solicitor General of the United States Department of Justice, Washington D.C. 20530 and to Cleveland Gambill, Esq. Assistant

United States Attorney, Tenth Floor, 510 West Broadway, Louisville, Kentucky 40202. Dated at Louisville, Kentucky this 26th day of May, 1989.

ALAN W. ROLES, Affiant

Subscribed and sworn to before me a Notary Public by Alan W. Roles, Affiant herein, this 26th day of May, 1989.

My Commission expires: December 3, 1989.

KATHI B. EBERLE
NOTARY PUBLIC STATE AT LARGE, KENTUCKY

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 87-6178/87-6183

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRUCE ZALMAN (87-6183), and MOHAMMAD SHARIFINASSAB (87-6178),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed February 23, 1989

Before: MERRITT, KRUPANSKY and BOGGS, Circuit Judges.

KRUPANSKY, Circuit Judge, delivered the opinion of the court, in which BOGGS, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 20-21) delivered a separate concurring opinion.

KRUPANSKY, Circuit Judge. Bruce Zalman (Zalman) and Mohammad Sharifinassab (Sharifinassab), defendants-appellants, have appealed from their respective criminal convictions following a jury trial before the United States District Court for the Western District of Kentucky.

Zalman and Sharifinassab were indicted by a federal grand jury for the Western District of Kentucky on May 6, 1986. Zalman was charged with two counts of aiding and abetting several individuals to make false statements to, and/or conceal material facts from, the Immigration and Naturalization Service (INS) in violation of 18 U.S.C.A. §§ 2 and 1001;[1] and three counts of conspiring to defraud the INS by arranging fraudulent marriages for various Iranians to permit them to remain in the United States as permanent resident aliens, in violation of 18 U.S.C.A. §§ 1001 and 371.[2] Sharifinassab

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[1]Section 2 states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C.A. § 2 (West 1969). Section 1001 holds that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined no more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A. § 1001 (West 1976).

[2]Section 371 reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A. § 371 (West 1966).

was charged with one count of conspiring with Zalman to arrange a sham marriage in violation of 18 U.S.C.A. §§ 371 and 1001, and one count of making false statements to, and/or concealing material facts from, the INS in his application for permanent resident status, in violation of 18 U.S.C.A. § 1001. Zalman and Sharifinassab were jointly tried before a jury, which convicted them on all counts.

The record of the trial disclosed the following underlying facts. Zalman, an attorney who had practiced in the Louisville, Kentucky area and had taught law at the University of Louisville, had a reputation in the Iranian community as an individual who would arrange fictitious marriages to gain permanent residence status for Iranians upon the expiration of their temporary student visae. Zalman's fee for his services ranged between $1,000 and $1,500, for which payment he would arrange a pseudo marriage with an eligible female, who would herself be paid between $500 and $1,000. In addition, Zalman would rehearse the "couple" as to a course of conduct calculated to mislead INS officials reviewing the circumstances of the marriage; namely, the manner in which to complete INS application forms so as to mislead the INS; the manner in which to respond to INS oral inquiries and interrogations; the manner in which to project the appearance of a valid marriage, i.e., moving the wife's clothing and personal items into the husband's residence; appearing publicly together; and other acts designed to further the charade of a valid marriage.

In anticipation of the expiration of his student visa in August, 1980, Mansour Kazemi (Kazemi) had requested assistance from Zalman to extend his residency in the United States.[3] The two discussed gaining both permanent residency

[3]Zalman was charged with one count of conspiring with Kazemi, to defraud the INS, by arranging a sham marriage between Kamemi and Deborah Gebhardt in order for Kazemi to gain both permanent residency and eventually citizenship.

and citizenship for Kazemi. Zalman eventually arranged a delusive marriage between Kazemi and Deborah Gebhardt (Gebhardt), one of Zalman's divorce clients. Zalman instructed the couple in all of the deceptive practices calculated to divert INS suspicions, for a fee of $1,000.00 plus an additional payment of $1,000.00 to Gephardt for participating in the fraudulent marriage.

The marriage ceremony occurred on July 8, 1980 in Tennessee. Within two weeks of the wedding, Gebhardt requested Zalman to initiate divorce proceedings against Kazami so she could marry another individual. Zalman refused and insisted that she remain married to Kazami for at least six months to insure against arousing the suspicions of the INS that the nuptials were a fraud. Gebhardt acceded to Zalman's instruction on this matter and her requested divorce was deferred. At the joint trial of Zalman and Sharifinassab, both Kazemi and Gebhardt testified that the marriage was a counterfeit, entered into only to permit Kazemi to gain permanent resident status.

In 1981, Zalman was introduced to Gholam Mohammadzadeh (Mohammadzadeh), whose student visa was about to expire.[4] Zalman arranged for Mohammadzadeh to enter into a bogus marriage with Gabrielle Goren (Goren) and provided the "couple" with instructions designed to convey the appearance of a proper and valid marriage. Specifically, Zalman counseled the "couple" to familiarize themselves with each other's families, to have a honeymoon, to move some of Goren's personal items into Mohammedzadeh's apart-

[4]Zalman was indicted for one count of conspiring with Mohammadzadeh, to defraud the INS, by arranging a sham marriage between Mohammadzadeh and Gabrielle Goren in order to enable Mohammadzadeh to gain permanent resident status; and one count of aiding and abetting Mohammadzadeh in making a false statement, or concealing material information, in the application for permanent residency which Mohammadzadeh filed with the INS.

ment, and to correspond with each other. In return for these arrangements, Mohammadzadeh paid Zalman and Goren $1,000.00 each.

Goren and Mohammadzadeh were married within fifteen minutes after their introductions to each other. The "couple" traveled to Florida for a honeymoon, as suggested by Zalman. However, Mohammadzadeh occupied his own room, while Goren and her mother occupied a separate room. Subsequently, Mohammadzadeh returned to college in Michigan, and Goren and her mother returned to their home in Kentucky. Mohammedzadeh and Goren never resided together nor did they consummate the marriage. Both Mohammadzadeh and Goren testified at trial that the marriage was a pretext, arranged only to permit Mohammadzadeh to obtain his permanent residency status.

Sharifinassab, an appellant herein, had entered the United States in 1977 on a student visa, which permitted him to remain in the United States until he received his degree in engineering scheduled for December 15, 1981.[5] Sharifinassab contacted Zalman in May or June of 1981 seeking assistance to remain in this country beyond his December 15, 1981 student visa expiration date.

Zalman advised Sharifinassab that he had three options by which to accomplish his purpose: political asylum; professional employment status in a specialized field; or marriage to an American citizen. Sharifinassab could not qualify for

[5]Zalman and Sharifinassab were both indicted on one count of conspiring with the other to defraud the INS, by entering a sham marriage in order to permit Sharifinassab to fraudulently gain permanent resident status. Additionally, Zalman was charged with one count of aiding and abetting Sharifinassab in submitting false statements, or in concealing material information, to the INS in his application for permanent resident status, and Sharifinassab was charged with one count of making false or fraudulent statements to the INS in his permanent residency application.

either asylum or professional employment status, and thus his only remaining option was a marriage to a citizen of the United States.

Since Sharifinassab had no girlfriend who was a citizen of the United States, Zalman suggested an introduction to a young woman who would agree to marry him in exchange for the payment of $500.00. Zalman proposed that Sharifinassab pay Zalman a fee of $1,000.00 for arranging the marriage and for performing the additional services preliminary to acquiring permanent residency status. Sharifinassab agreed to the arrangement, and in June, 1981, Zalman introduced him to a young woman named Kellie Baker (Baker) at his office.

Sharifinassab and Baker were married on October 1, 1981 in a wedding ceremony performed in Tennessee. There was testimony at the trial that Sharifinassab had cashed a check in the amount of $500 the day of the wedding. Although Sharifinassab asserted that he used this money for various wedding expenses, contradictory testimony at the trial indicated that the money had been paid to Baker as part of the agreement to enter into the mock marriage. Immediately after the wedding ceremony had been performed, Sharifinassab presented Zalman with a check for an additional $1,000.00.

After the wedding, Baker moved some of her clothing into Sharifinassab's apartment, and attended several social functions with him. However, both of Baker's roommates, who worked with her at a massage parlor, testified at trial that, after the wedding ceremony in October, 1981, Baker had continued to reside with them until December, 1982 in an apartment which the three of them had been sharing.[6] Addition-

[6]Baker committed suicide after testifying before the grand jury, but before the criminal trial had begun; the district court barred the use of Baker's grand jury testimony at the criminal trial.

ally, the roommates testified that most of Baker's clothes and belongings remained at the apartment, that Baker stored groceries at the apartment and that she continued to pay her pro rata share of the rent and other living expenses. They also testified that male companions of Baker's, other than Sharifinassab, had frequently shared Baker's bedroom with her during the time period here in issue.

In December, 1981, Sharifinassab prepared and filed an application with the INS seeking permanent resident status, based upon his marriage to Baker. Testimony was presented that Zalman reviewed the application and advised Sharifinassab and Baker as to appropriate responses to be given to INS investigators concerning their marriage. The INS subsequently granted permanent residency status to Sharifinassab. Thereafter, in August or September of 1982, Baker filed for and was granted a separation from Sharifinassab, which was amended to a dissolution of the marriage in June, 1983. Zalman represented Baker during the dissolution proceedings.

Sharifinassab and Zalman were indicted by a federal grand jury for the Western District of Kentucky on May 6, 1986. The two defendants were jointly tried before a jury. On July 16, 1987, the jury convicted Sharifinassab and Zalman on all counts charged in the indictment. Both defendants timely appealed from the judgment of conviction entered pursuant to the jury's verdicts.

On appeal, Sharifinassab has argued that since the indictment was anchored in the assumption that he was in the United States illegally, the enactment of the Immigration Reform and Control Act of November 10, 1986, 8 U.S.C.A. § 1255a (West Supp. 1988), divested the district court of jurisdiction to entertain the criminal charges against him because the Act mandated the Attorney General to adjust his status to that of a lawfully admitted resident which, pursuant to a legal fiction conceived by his attorney, veiled Sharifinassab with amnesty from criminal prosecution, which he

accepted.[7] Although the Act does not in fact confer authority upon the Attorney General to *retroactively* adjust an alien's status in any manner, including that of temporary residence, Sharifinassab nevertheless hypothecated that the Act retroactively legalized his resident status upon his satisfying its requirements.[8] He thereafter proceeded from this false premise to argue that since he had attained legal alien status by virtue of the Act by the time he married Kellie Baker, and if the marriage was valid in all respects, then, in that event, his application for permanent residence status after the mar-

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[7]The 1986 Act makes no direct, indirect or inferential reference to any grant of amnesty from criminal or civil prosecution of any kind. Instead it merely directs that the "Attorney General shall adjust the status of an alien lawfully admitted for temporary residence" provided that the alien meets specific requirements. 8 U.S.C.A. § 1255a (West Supp. 1988). For the legislative history behind the adoption of the Immigration Reform and Control Act of 1986, along with a discussion of the eligibility requirements contained therein, see generally H.R. Rep. No. 99-682 at 71-72, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5649, 5675-76.

[8]Subsequent to his indictment on May 6, 1986, Sharifinassab filed a timely application under the 1986 Reform Act with the INS, requesting the Attorney General to adjust his status to that of a temporary resident alien. The INS initially accepted his application on May 15, 1987, before his criminal trial in the district court had commenced. Sharifinassab notified this court, by letter dated November 11, 1988, that the INS had since reconsidered its initial decision of May 15, 1987 and, upon reconsideration, had denied his application for Temporary Resident Status under the 1986 Reform Act as of November 1, 1988.

It is not clear what effect the INS's decision of November 1, 1988 had upon Sharifinassab's allegation that he was a legal alien at the time of his criminal trial as a result of the initial acceptance of his application under the 1986 Reform Act. Sharifinassab has indicated that he would appeal the INS's latest determination. This court will assume *arguendo* that Sharifinassab was legitimately within the ambit of the Immigration Reform and Control Act during the pendency of the criminal proceedings in the district court below for the purpose of considering his charge that the Act constituted a grant of amnesty from criminal prosecution.

riage was proper and he would have, as a result of the valid marriage, been a legal resident alien in the United States. Conversely, he reasons that if his marriage was a fraud, then his residence status thereafter would have been that of an illegal alien and the Act conferred amnesty upon him, the fiction read into the Act by his attorney, which would have shielded him from prosecution under the indictment. Consequently, he argued, the indictment should have been dismissed.

The language of the Immigration Reform and Control Act of 1986 discloses that it was enacted to adjust the *status* of an individual for immigration purposes, and it makes no mention whatsoever concerning the government's authority to prosecute aliens for criminal activity or to grant amnesty from criminal or civil actions of any kind. The Act fails to incorporate, either directly or by inference, any reference whatsoever to a grant of amnesty to aliens who have committed crimes while in the United States. Nor does the Act, directly or by inference, shield aliens from criminal prosecutions of any kind. Furthermore, an examination of the legislative history of the statute indicates that Congress had not intended the Act to serve as a vehicle for conferring amnesty to aliens who had committed crimes while in the United States. To the contrary, from an examination of the legislative history of the Act it is apparent that it was made applicable only to individuals who had entered the country illegally but who had otherwise abided by the laws of the country during their illegal residency.

> The Committee believes that any equitable proposal for immigration reform must address the large population of undocumented aliens living and working in the United States, many for a long period of time. Therefore, the bill requires the Attorney General to grant *legal status* to those aliens who have been in the United States a substantial number of years,

> have developed equities here, *and have abided by the laws of this country.*
>
> . . . .
>
> Technical and documentary grounds of exclusion are automatically waived. The remaining grounds of exclusion may be waived by the Attorney General for humanitarian purposes, to ensure family unity, or when it is in the national interest. *However, the grounds of exclusion relating to violations of the law* or engaging in the persecution of others *may never be waived.*

H.R. Rep. No. 99-682 at 71-72, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5649, 5675-76 (emphasis added). Accordingly, appellant's jurisdictional argument is without merit.

Sharifinassab has also urged that the district court erred in denying his motion to sever his trial from that of his co-defendant, Zalman. A motion for a severance, governed by Rule 14 of the Federal Rules of Criminal Procedure,[9] "is left to the discretion of the trial court, and the denial of a severance 'will not be disturbed on review unless the district court abused its discretion in denying the motion.' " *United States v. Swift,* 809 F.2d 320, 322 (6th Cir. 1987) (quoting *United States v. Gallo,* 763 F.2d 1504, 1524-25 (6th Cir. 1985), *cert. denied sub nom. Graeve v. United States,* 474 U.S. 1068, 106 S.Ct. 826, 88 L.Ed.2d 798 (1986)); *accord Opper v. United States,* 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99

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[9]Rule 14 states, in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information . . . the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Fed. R. Crim. P. 14.

L.Ed.2d 101 (1954); *United States v. Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984). "A general rule in conspiracy cases is that persons jointly indicted should be tried together. This is particularly true where the offenses charged may be established against all of the defendants by the same evidence." *United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983); *accord United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988). In order to justify reversal of a criminal conviction upon a district court's denial of a motion to sever, the defendant has the burden of proving that substantial prejudice resulted from the court's failure to grant a separate trial. *Robinson*, 707 F.2d at 879; *Gallo*, 763 F.2d at 1525; *United States v. Bibby*, 752 F.2d 1116, 1123 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1986).

In the instant appeal, Sharifinassab asserted that the district court erred in refusing to grant a severance because testimony against Zalman disclosed two counts of conspiracy and two counts of aiding and abetting which testimony, although it did not apply to him, would prejudice the jury against him by virtue of his association with Zalman. "Merely because inflammatory evidence is admitted against one defendant, not directly involving another codefendant (and with which the other is not charged) does not, in and of itself, prove substantial prejudice in the latter's trial." *Gallo*, 763 F.2d at 1525. "[A] jury is presumed capable of sorting out evidence and considering each count and each defendant separately." *Swift*, 809 F.2d at 323 (quoting *United States v. Frazier*, 584 F.3d 790, 795 (6th Cir. 1978)); *United States v. Thomas*, 728 F.2d 313, 319 (6th Cir. 1984). Furthermore, the district court in the instant case instructed the jury that it was not to consider the evidence which was presented as proof to support the criminal counts against Zalman which did not involve Sharifinassab. "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and

strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin,* 471 U.S. 307, 324 n.9, 105 S.Ct. 1965, 1976 n.9, 85 L.Ed.2d 344 (1985); *accord United States v. Busacca,* No. 88-3099, slip op. at 9 (6th Cir. Dec. 6, 1988) ("A reviewing court must presume that the jury followed the judge's instructions."); *see also Richardson v. Marsh,* 481 U.S. __, __, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987). Sharifinassab has failed to demonstrate any evidence to suggest that the jury failed to understand or follow the district court's instruction on this issue, and consequently, this assignment of error is not well taken.

Sharifinassab has additionally alleged that the district court erred in denying his motion for judgment of acquittal because the indictment failed to state a criminal offense. The indictment charged that Sharifinassab had conspired with Zalman to conceal the actual purpose of his marriage from the INS in Sharifinassab's application for permanent residency. Sharifinassab argued that since a marriage is presumed to be valid on its face, the purpose for the marriage is not a "material fact" punishable under criminal statutes.

The courts which have examined this issue have concluded, with virtual unanimity, that the underlying purpose of a marriage is a material fact which bears upon the validity of the marriage, and that any false or fraudulent misrepresentation regarding the actual purpose of a marriage in order to gain status as a resident of the United States can be punished under 18 U.S.C.A. § 1001. "The theory underlying the concealment charge is that the intention of the parties to the marriage to limit their relationship is a material fact under the immigration law." *United States v. Lozano,* 511 F.2d 1, 4 (7th Cir.), *cert. denied,* 423 U.S. 850, 98 S.Ct. 94, 46 L.Ed.2d 74 (1975); *accord United States v. Yum,* 776 F.2d 490, 493 (4th Cir. 1985); *Johl v. United States,* 370 F.2d 174, 177 (9th Cir. 1967); *United States v. Rubenstein,* 151 F.2d 915, 919 (2nd Cir.), *cert. denied,* 326 U.S.766, 66 S.Ct. 168, 90 L.Ed.2d 462 (1945); *see also United States v. Qaisi,* 779 F.2d 346, 348 (6th

Cir. 1985) (conviction under 18 U.S.C.A. § 1001 for making false statement to INS about viability of marriage reversed and remanded for dismissal because "the indictment did not charge a sham marriage."); *United States v. Bartle*, 835 F.2d 646, 647 (6th Cir. 1987) (conviction for making false statement on applicattion for permanent resident status to the effect that he was living with spouse prior to filing for permanent resident status), *cert. denied*, _ U.S. _, 108 S.Ct. 1245, 99 L.Ed.2d 443 (1988); *cf. Lutwak v. United States*, 344 U.S. 604, 610-12, 73 S.Ct. 481, 485-86, 97 L.Ed.2d 593 (1953). The defendant's contention that the indictment for falsely or fraudulently concealing the actual purpose of the marriage failed to state an actionable offense is incorrect. Accordingly, the judgment against Sharifinassab is affirmed.

Zalman was convicted on two counts of aiding and abetting aliens in submitting false information to or concealing material information from the INS on applications for permanent resident status, in violation of 18 U.S.C.A. §§ 2 and 1001, and of three counts of conspiring with aliens to defraud the INS by submitting false information to or concealing material information from INS on applications for permanent residence or citizenship, in violation of 18 U.S.C.A. §§ 371 and 1001. Section 1001 is phrased in the disjunctive and its violation is satisfied by proof that the accused either made a false or fraudulent statement *or* concealed a material fact from a department or agency of the United States. *See, e.g., United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096-97 (11th Cir. 1983); *United States v. Irwin*, 654 F.2d 671, 978-79 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982). *See generally* Goldstein, *Conspiracy to Defraud the United States*, 69 Yale L.J. 405, 454 (1959). The district court in the instant case charged the jury in the alternative concerning the section 1001 offense, instructing that it could convict Zalman under the aiding and abetting counts if it found that he had aided and abetted his Iranian clients *either* in filing false information with *or* in concealing mate-

rial facts from the INS. Similarly, the court instructed the jury that it could convict Zalman under the conspiracy counts if it concluded that he had conspired with the aforenamed Iranians *either* to file false information with *or* conceal material information from the INS.

In the case at bar, the "filing of false information" element of the section 1001 counts addressed the responses which Zalman's Iranian clients had provided on INS Immigration Form 1-485 to the questions "are you married?" and "do you [and your spouse] reside together?" *See, e.g., United States v. Bartle,* 835 F.2d 646, 647 (6th Cir. 1987), *cert. denied,* _ U.S. _, 108 S.Ct. 1245, 99 L.Ed.2d 443 (1988); *see also United States v. Al-Kurna,* 808 F.2d 1072, 1073 (5th Cir.), *cert. denied,* _ U.S. _, 107 S.Ct. 1909, 95 L.Ed.2d 515 (1987). Zalman has conceded the propriety of the jury instruction that permitted his conviction pursuant to section 1001 upon the government's proof that he had aided and abetted, and/or conspiracy with an alien in falsely responding to these two questions. Accordingly, there is no issue raised by Zalman concerning the district court's instruction to the jury on that charge.

However, Zalman has charged as error the trial court's failure to instruct the jury as to the government's burden to prove that he and/or his Iranian clients had a duty to disclose the purposes of their marriages as they related to attaining permanent resident status, and that he was improperly convicted of "concealing material facts concerning a sham marriage," because he had no independent duty to disclose that information. Zalman was correct in asserting that in order to support "concealment of material information" from a government agency or department under section 1001, the government was required to prove that Zalman or his clients had a duty to disclose the particular information which was concealed from the government. *See, e.g., United States v. Larson,* 796 F.2d 244, 246 (8th Cir. 1986) ("[W]e hold that [the defendant] cannot be guilty of concealing material facts

unless there was a duty to disclose the facts."); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986) ("It is clear that in order to support a section 1001 concealment conviction there must be a legal duty to disclose the facts the defendant was convicted of concealing."); *see also United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States v. Irwin*, 654 F.2d at 678. Zalman's suggestion that the district court erred in failing to charge the jury as to this element, however, is misplaced because the issue of duty, which has been imposed by judicial *stare decisis*, and proof thereof is not a question of fact to be decided by a jury. It is, to the contrary, a question of law properly considered and determined by the court. *See, e.g., United States v. Tobon-Builes*, 706 F.2d 1092, 1097 (11th Cir. 1983); *Irwin*, 654 F.2d at 678; *cf. Kungys v. United States*, _ U.S. _, _, 108 S.Ct. 1537, 1547, 99 L.Ed.2d 839 (1988) (analogous issue of materiality is question of law to be decided by the court); *United States v. Chandler*, 752 F.2d 1148, 1150 (6th Cir. 1985) (Analogous issue of "[m]ateriailty under § 1001 is a question of law."); *United States v. Adadi*, 706 F.2d 178, 180 (6th Cir.) ("[T]he materiality issue in a section 1001 prosecution should be treated as a question of law."), *cert. denied*, 464 U.S. 821, 104 S.Ct. 86, 78 L.Ed.2d 95 (1983). Consequently, there was no requirement imposed upon the trial court to instruct the jury as to the issue of duty as an element of the concealment offense.

In the alternative, Zalman has asserted that even if the issue of duty was one of law to be decided by the court, the government neither alleged nor proved that Zalman or his clients had any legal duty to disclose the information that served as the basis for his convictions. In the case at bar, however, the "concealment of material information" offense incorporated into § 1001 related to Zalman's efforts, if any, that had constituted aiding and abetting, and/or conspiracy with, his Iranian clients in concealing material information from the INS concerning the truthfulness of the answers

which had been submitted by the Iranians to the two critical controversial questions which appeared on the permanent residency application Form I-485, namely "are you married?" and "do you [and your spouse] reside together?" Thus the burden of proof to support the government's charged offense of "concealment" including the element of the duty to disclose the purpose of the marriage was identical to the government's aready satisfied burden to prove the "felony of false information" charge of § 1001. Accordingly, since the judicially imposed proof of duty, as it relates to the concealment charge, was in the case at bar identical to the evidence that concededly supported the charge of filing false information, Zalman's suggestion that the government failed to introduce any evidence to support a conclusion that there was a duty to advise the INS of the fictitious purposes of the marriages in question under the "concealment of material information" charge is without merit.[10]

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[10]Because both the "duty to disclose" and the "concealment of material information" constituted the same generic offense in the instant case, no error resulted from the trial court's failure to instruct the jury that it was required to unanimously agree on one of the two alternative elements that constitute a violation of § 1001. *See, e.g., United States v. McGuire,* 744 F.2d 1197, 1202 (6th Cir. 1984) (It is well established that no specific instruction as to jury unanimity is required where "potentially devisive theories of liability are not 'conceptually distinct.' "), *cert. denied,* 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985); see *also United States v. Busacca,* No. 88-3099, slip op. at 10 (6th Cir. Dec. 6, 1988) (No special instruction regarding jury unanimity needed where the charge "creates, one generic offense . . . that can be proven in two different ways."); *United States v. Bouquett,* 820 F.2d 165, 169 (6th Cir. 1987) ("[T]his court does not require jurors to agree unanimously as to a theory of guilt where a single generic offense may be committed by a variety of acts."); *United States v. McPherson,* 782 F.2d 66, 68 (6th Cir. 1986) (same). *See generally United States v. Duncan,* 850 F.2d 1104, 1110-1115 (6th Cir. 1988).

Zalman has additionally urged that the ditrict court erred in permitting testimony that he had interrogated various women concerning their willingness to enter into a sham marriage with an alien for a monetary consideration to be admitted during his trial. The district court concluded that the testimony was within an exception to Federal Rule of Evidence 404(b),[11] and allowed the testimony. Zalman urged that, because he had offered to stipulate the issue of his intent to commit the alleged offenses, the testimony did not relate to a matter in issue and was thus inadmissible. *See, e.g., United States v. Ismail,* 756 F.2d 1253, 1259 (6th Cir. 1985); *United States v. Largent,* 545 F.2d 1039, 1043 (6th Cir. 1976), *cert. denied,* 429 U.S. 1098, 97 S.Ct. 1117, 51 L.Ed.2d 546 (1977). This argument is incorrect for several reasons.

An examination of Zalman's stipulation demonstrated that it was conditioned upon the government's acquiesance. The government, however, rejected the stipulation. Zalman cannot now allege as error the government's refusal to accept the stipulation. *See Allen v. Morris,* 845 F.2d 610, 616 (6th Cir. 1988) ("[D]efendant's] trial counsel pursued a deliberate trial strategy which failed.") (quoting *Trussell v. Estelle,* 699 F.2d 256, 262 n.4 (5th Cir.), *cert. denied,* 464 U.S. 853, 104 S.Ct. 168, 78 L.Ed.2d 153 (1983)), *petition for cert. filed* (July 15, 1988); *see also Taylor v. Illinois,* _ U.S. _, _, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988) ("The client must accept the consequences of the lawyer's [strategic] decision[s]" relating to evidentiary matters.); *cf. United States v. Ramos,* Nos.

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[11]Rule 404 (b) states:

> **(b) Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404 (b).

87-3921, 87-3922, 87-3923, slip op. at 14-15. (6th Cir. Nov. 14, 1988).

Moreover, the district court had admitted the testimony at issue, not merely to demonstrate Zalman's intent, but also to prove the existence of a common plan or scheme relating to the offenses. *See United States v. Vincent,* 681 F.2d 462, 465 (6th Cir. 1982) (relevant to demonstrate "the common scheme or history of the crime") (quoting *United States v. McDaniel,* 574 F.2d 1224, 1227 (5th Cir. 1978), *cert. denied,* 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1979)); *Largent,* 545 F.2d at 1043 (relevant "to show a consistent pattern of conduct over the entire time."); *see also* McCormick, *Evidence* § 100 (2nd ed. 1972) (relevant to prove the "existence of a larger continuing plan, scheme or conspiracy, of which the present crime on trial is a part."), *quoted in United States v. Passarella,* 788 F.2d 377, 384 (6th Cir. 1986). Because Zalman has not charged that the testimony was inadmissible for the purpose of proving a common plan, the assignment of error is not well taken.

Zalman has further asserted that the district court erred in not dismissing the count anchored in a conspiracy with Kazemi to obtain citizenship by means of a fraudulent marriage as barred by the applicable statute of limitations. The statute of limitations for prosecutions initiated pursuant to 18 U.S.C.A. § 371 is five years from the date of the commission of the last overt act in further of the conspiracy. *See* 18 U.S.C.A. . § 3283. It was undisputed that Zalman's last contact with Kazemi had taken place on or about May 6, 1981. In 1985, after moving from Kentucky to California, Kazemi visited an immigration consulting agency in Los Angeles, requesting assistance in obtaining United States citizenship. After the agency had advised him that the INS might question the validity of his earlier marriage to Gebhardt, Kazemi decided not to file an application for citizenship.

Zalman has argued that, because his last contact with Kazemi occurred in 1981 and since the superseding indict-

ment was not issued until April of 1987, the district court erred in not dismissing the count alleging a conspiracy with Kazemi as barred by the statute of limitations. Zalman has urged this court to reject the 1985 request for assistance from the immigration consulting agency as an overt act, because his contact with Kazemi ended in 1981, and any conspiracy which may have existed between himself and Kazemi ended at that time. In response, the government countered that the last overt act occurred in 1985 when Kazemi undertook, without Zalman's assistance or knowledge, to receive advice and assistance from the immigration consulting agency in Los Angeles with a view toward obtaining citizenship, which exploration was well within the five year statute of limitations.

A careful review of the evidence presented leads to the conclusion that the government failed to prove any nexus between the earlier conspiracy between Zalman and Kazemi in 1981 and the subsequent actions independently undertaken by Kazemi's Los Angeles inquiry concerning the possibility of applying for citizenship in 1985, some four years after his last contact with Zalman. The action taken by Kazemi was too remote to support a charge of conspiracy to obtain citizenship and, accordingly, the district court erred in not dismissing count number 1 of the superseding indictment of May 5, 1987, which charged that Zalman had conspired with Kazemi to assist him in gaining citizenship.

This court has considered the defendants' remaining assignments of error and has concluded that they are without merit. Accordingly, the judgments of conviction entered against the defendant Sharifinassab are hereby **AFFIRMED.** The judgments of conviction entered against Zalman are hereby **AFFIRMED**, with the exception of the judgment arising from his conviction on count 1 of the superseding indictment of May 4, 1987 which is hereby **REVERSED** and **REMANDED** with an instruction to enter a judgment of acquittal as to that count.

MERRITT, Circuit Judge, concurring. I concur in all respects in the result reached by the Court. I would not reach the merits of the issue of the precise limits of Zalman's duty to disclose the sham nature of the marriages in question because this issue was not properly raised in the court below by objection to the instructions to the jury, or on motion for judgment of acquittal, or otherwise.

It is clear from the record in this case that Zalman must have known that anyone who read the documents submitted would be misled about the nature and legitimacy of the marriages he caused his clients to enter. The failure to disclose the fact that the entire purpose of the marriages was to circumvent the immigration law constituted a fraud. It was a fraud because Zalman knew that, without more, the reader would be misled by the documents. The investigator would assume certain facts and purposes which were not true. The duty to disclose arises because the lawyer knew that the facts as stated, were highly misleading and in context, amounted to fraud.

Zalman cannot now have his conviction reversed, as he seems now to contend, because the District Court did not define precisely for the jury the origin of the duty to disclose, or the reason the law creates such a duty, or its limits. My reading of the record and the briefs of the parties indicates that Zalman never asked for a definition of the duty to disclose, never objected to the instruction on this ground and never claimed that the situation did not raise such a duty. He, therefore, has waived his objection on this ground by his failure to raise it.

Neither do we have plain error here, as Zalman contends, because the failure of the District Court to be more precise "does not affect substantial rights [and therefore] shall be disregarded." Rule 52(a), Fed. R. Crim. P. The proof was overwhelming, as Judge Krupansky makes clear. Every lawyer knows that he may not participate with his client in the

commission of a crime. What is misleading is a matter of context, and the existence of a duty to disclose arises from the situation. Here the lawyer did not overlook the true facts or act negligently because of the press of business. The proof that he deliberately chose to conceal the real facts on the documents is clear. Only if we hold that the lawyer had no duty to be truthful in submitting the documents could we justify setting aside the convictions. To so hold would turn the "plain error" doctrine on its head.

NOS. 87-6178/87-6183
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE	)
v.	)
BRUCE ZALMAN (87-6183) and MOHAMMAD SHARIFINASSAB- (87-6178) DEFENDANT-APPELLANTS	)

PETITION FOR REHEARING

Comes the Appellant, Mohammad Sharifinassab, pursuant to Rule 40 of the Rules of Appellate Procedure and petitions the Court for a rehearing on the grounds set forth herein below.

1. The Court misapprehended facts regarding the Appellant, Sharifinassab.

a. The Court stated that "Sharifinassab could not qualify for either asylum or professional employment status." (Opinion, page 5). Appellant, whose uncle had been killed by forces in the new Iranian

government, considered applying for political asylum, but feared that this would cause reprecussions for his family in Iran. (Sharifinassab at T.R. 108, 62). His marriage to an American made it unnecessary to pursue this option.

b. The Court stated that "Zalman suggested an introduction to a young woman who would agree to marry him in exchange for the payment of $500.00." (Opinion, page 6). Zalman did suggest introducing Appellant to young women, but there is no evidence in the record of any discussion between Zalman and this Appellant about the payment of $500.00 or any sum to any woman in exchange for an agreement to marry. Other Iranians testified about their agreements and payments to women to marry them.

c. The Court states that "Zalman proposed that Sharifinassab pay Zalman a fee of $1,000.00 for arranging the marriage and for performing the additional services

preliminary to acquiring permanent residency status." (Opinion, page 6). There is no evidence in the record of any such proposal being made by Zalman to this Appellant. The proof was that Appellant paid Zalman $1,000.00 for consultations and research. (Sharifinassab at T.R. 108, 72). Another Iranian, Mohammadzadeh, testified that he, Mohammadzadeh, paid Zalman $1,000.00, and indicated that this fee was for arranging a marriage to acquire permanent residency status.

d. The Court states that "Sharifinassab agreed to the arrangement." (Opinion, page 6). There is no evidence in the record regarding such an agreement between Zalman and this Appellant. Other Iranians testified about their own agreements with Zalman.

e. The Court states that the wedding ceremony was performed in "Tennessee." (Opinion, page 6) The proof from numerous witnesses was, that unlike the other couples about which evidence was heard, the wedding ceremony was performed in Louisville, Kentucky.

f. The Court stated "Immediately after the wedding ceremony had been performed, Sharifinassab presented Zalman with a check for an additional $1,000.00." (Opinion, page 6). There is no evidence in the record that this Appellant paid Zalman a check or any money whatsoever after the wedding ceremony. Appellant gave Zalman only one check. This was for $1,000.00 for research and consultations. This check was given to Zalman on August 24, 1981 well before the wedding of October 1, 1981.

g. The Court states that "both" of Baker's roommates worked with her at a massage parlor. (Opinion, page 6). Baker had only one roommate, Shari Bowlin. She did not work at a massage parlor. The record reflects that an employee of the massage parlor, Debra Akers, spent considerable time staying at Baker's apartment from October 1, 1981 to November 1, 1981.

h. The Court states that "Baker filed for and was granted a separation." (Opinion, page 7). There is no evidence that she was ever granted a legal separation. She filed for a separation and subsequently was granted a divorce.

Other "facts" recited in the Opinion were disputed at trial by Appellant. He recognizes, however, the right of this Court to accept as true an interpretation of the evidence other than offerred by Appellant,

where there is at least some evidence offerred in support of such interpretation.

This Appellant respectfully submits that the foregoing could be considered nit picking examples of inadvertent misstatements of the facts that ordinarily would be considered irrelevant. In fact, arguments could be made that inferences could possibly be drawn to support the Court's understanding of the facts in statements quoted in b, c, and d, but there was no direct or circumstantial evidence presented to the jury to substantiate that Zalman and this Appellant had such a discussion. There was evidence that other Iranians and Zalman had such discussions. The conclusion that such a discussion occurred between Appellant and Zalman, set forth in the Opinion as a statement of fact, may have been drawn from the testimony that Zalman and other Iranians

had such discussions. Due process requires that such conclusions must be drawn from direct or circumstantial evidence that the parties to an "agreement" had such a discussion preliminarily to reaching the agreement, not merely from an inference that because others had discussions and reached an agreement, then Appellant and Zalman must have had a similar discussion and reached a similar agreement.

Appellant recited at length in his Brief the factual history of this case. While the United States added thereto and set forth some conclusions of its own in its Statement of Facts, it did not refute or deny the accuracy of the actual facts that Appellant had stated in his Brief. If any single one of the statements of the Court outlined above were the only misapprehension of fact, then Appellant would not assert this as a ground

for his Petition for Rehearing. Appellant recognizes for example that whether he married in Tennessee or Kentucky is immaterial and irrelevant to his guilt or innocence. But for the Court to have misapprehended the facts to the extent that has occurred demonstrates the spill over effect of how improper inferences can be drawn by which an innocent person can stand convicted. The overall effect of accepting the statements outlined above as fact is to provide a foundation upon which to uphold the decision of the trial court to deny severance. The cumulative effect of the acceptance of all of the facts stated by the Court, as outlined above as the truth, strongly prejudiced the Court against an understanding of why the motion for severance should have been granted. The Opinion reflects that this Court experienced the same

confusion that must have been experienced by the jury because of the failure to grant Appellant's motion for severance.

This Court has had months to study the written record of the transcript. The jury had to rely on its collective memory (in a trial lasting almost two weeks that was interrupted in the middle by a one month continuance) to attempt to sort out the facts regarding several similar sounding fact situataions involving various Iranians with difficult to pronounce names.

This Appellant attempted to demonstrate that although he was an Iranian student who desired to stay in the United States, that although he did marry a woman who he initially met in Zalman's office, and that although he applied for permanent residency based on that marriage, there were many distinctions between his situation and those

of the other Iranians who testified in exchange for various agreements offerred by the prosecution. The Opinion of this Court, however, reflects inaccuracies of fact and states as fact inferences and conclusions about this Appellant that are drawn from evidence concerning other Iranians involved with Zalman who entered into fradulent marriages to gain permanent residency in this country. The Opinion clearly demonstrates how a jury, which did not have the benefit of the time to study the written transcript, became unable to follow the trial court's instructions to consider each case separately and decide the case for each defendant solely on the evidence which applies to each defendant. The spill over effect of the evidence introduced by the United States against Zalman concerning the fraudulent marriages of other Iranians highly prejudiced

this Appellant. The government relied on the impact of its case against Zalman to carry the jury to a conviction of Appellant.

Appellant's Motion for Severance should have been granted for all of the reasons set forth in his Brief herein at pages 22 through 30. Even though there is no written record of the jury deliberations to study, the misapprehension of the facts reflected in the Opinion entered herein by this Court demonstrates how the jury could have been confused and establishes that this Appellant has met his burden of proving substantial prejudice resulted from the District Court's failure to grant Appellant a separate trial.

2. The Court misapprehended the law with regard to the effect of the mandatory language of the Immigration Reform and Control Act of 1986.

At the time he filed his Petition to have his status adjusted by the United States Attorney Appellant met all of the requirements of the Act. At the time he submitted his application he had not been convicted of any felony or of three or more misdemeanors. See 8 U.S.C. 1255a(a)(4)(B). The language of the Act directing the Attorney General to adjust the status to that of an alien who met the qualification requirements set forth therein is mandatory. The means by which the alien came to be illegally in this country is irrelevant. The law of which this Appellant was accused of violating were laws that had to do with how he came to reside within this country unlawfully. To allow others, who broke various laws pertaining to either their entry or illegal residency after a legal entry, to go unprosecuted and to permit them to have

their status adjusted, and not to accord the same treatment to the Appellant is a denial of due process and equal protection of the law.

Had the Appellant been convicted of criminal activity before he applied to have his status adjusted he would not have been eligible for the protection afforded by the Act. He was not. Had Appellant been charged herein with a crime not related to those acts of which he was accused, then the Act would not have shielded him from this prosecution. The gravaman of the charges against the Appellant in the instant case was that his course of conduct was to do certain illegal acts in order to reside in the United States. This is no different from the conduct of other illegal aliens who took some affirmative steps in violation of the law to illegally be in the United States and who

have been permitted to have their status adjusted under the Act without being prosecuted.

The irony of Appellant's situation is that he not only stands convicted of doing certain acts to reside in this country, which made his residency here illegal, but the Immigration and Naturalization Service has determined that he was in a lawful status because he was on January 1, 1982 in the lawful status of a monimigrant student and because on June 21, 1982 he was granted lawful permanent resident alien status on the basis of his marriage to an American citizen.[1] If the basis for the INS determination that Appellant's status was legal was the illegal act of having falsified

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[1]That determination is now being appealed.

his application for permanent residence, then he was illegal even though the resulting status was determined to be lawful. One cannot achieve a lawful status by an unlawful act. If he was illegally in this country, he qualified to have his status adjusted under the Act.

While the Act does not use the term "amensty", the effect of the act is to provide amnesty from prosecution for all who apply and qualify to have their status adjusted. The effect of the act was to say to those aliens who broke immigration laws by residing illegally in the United States: turn yourselves in and your status will be adjusted; you will not be prosecuted. "Amnesty" was clearly implied and recognized by even the INS as part and parcel of the Act.

Consider the following analogy: A and B are twin brothers, who are aliens residing in this country as students. A obtains permanent residency status. B's student status is about to expire and B is required to leave. Before leaving the brothers are on a ski trip and A is killed in an avalanche. B, who survives, steals his deceased brother's identification and claims that B was the one killed. B under the identity of A is now in the status of being lawfully in the United States. He assimilates into society. Time passes and B under the identity of A makes a mistake of permitting himself to be finger printed and the truth is learned. B then would be deported for not lawfully being in the United States, even though by his unlawful act he had achieved an apparent "status" of being lawfully present. His unlawful presence in the United States is

contrary to and in violation of the law. Had B come forward during the time period allocated under the Immigration Reform and Control Act of 1986 and applied to have his status adjusted, then he would have qualified under the mandatory language of the Act. Furthermore, he would not have been subject to prosecution for his violation of the immigration laws from that fateful day when he stole his brother's identity. If the contrary were true, then every alien who applied to have his status adjusted under the Act, must be prosecuted. This is not happening.

Thousands of other aliens who applied to have their status adjusted were not prosecuted for their violations of the laws which were violated for them to have been and remained illegally in this country; Appellant was. The denial to the Appellant of

the same due process of law extended to other aliens who made their application to have their status adjusted, was a denial of the Constitutional rights afforded to this Appellant.

Respectfully submitted,

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CERTIFICATION

It is hereby certified that a true and complete copy of the foregoing Petition was (mailed) (handdelivered) this ___ day of March, 1989, to: Cleveland Gambill, Assistant United States Attorney, Tenth Floor, Bank of Louisville Bldg., 510 W. Broadway, Louisville, KY 40202, Frank Haddad, Jr. Attorney at Law, 529 Kentucky Home Life Building, Louisville, KY 40202 and to Scott T. Wendelsdorf, Attorney at Law, 1406 One Riverfront Plaza, Louisville, KY 40202, Carter G. Phillips, Mark D. Hobson, Sidley & Austin, 1722 Eye Street, N.W. Washington, DC 20006.

S/Alan W. Roles
ALAN W. ROLES

NO. 87-6178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,	)	
v.	)	O R D E R
MOHAMMAD SHARIFINASSAB, Defendant - Appellant.	)	

BEFORE: MERRITT, KRUPANSKY and Boggs, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

S/Leonard Green
Leonard Green, Clerk

FILED APR 3 1989 LEONARD GREEN, Clerk